FILE COPY

Office Supreme Court, U.S.
FILED
NOV 10 1960
JAMES R. BROWNING, Clerk

No. 411

In the Supreme Court of the United States

OCTOBER TERM, 1960

GEORGE SAM MAGIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,

MALCOLM RICHARD WILKEY,
Assistant Attorney General.

BEATRICE ROSENBERG,
JULIA P. COOPER,
Attorneys,
Department of Justice,
Washington 25, D. C.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statutes involved	2
Statement	4
Argument	8
Conclusion	20

CITATIONS

Cases:

Arena v. *United States*, 226 F. 2d 227	20
Ballard v. *United States*, 329 U.S. 187	16
Beckanstin v. *United States*, 232 F. 2d 1	11
Cramer v. *United States*, 325 U.S. 1	8
Dolan v. *United States*, 218 F. 2d 454, certiorari denied, 349 U.S. 923	12
Dow v. *Carnegie-Illinois Steel Corp.* 224 F. 2d 414, certiorari denied, 350 U.S. 971	16
Fotie v. *United States*, 137 F. 2d 831	11
Glasser v. *United States*, 315 U.S. 60	16
Haupt v. *United States*, 330 U.S. 631	8
Kersten v. *United States*, 161 F. 2d 337, certiorari denied, 331 U.S. 851	18
Pittsburgh Plate Glass Company v. *United States*, 360 U.S. 395	12
Shockley v. *United States*, 166 F. 2d 704, certiorari denied, 334 U.S. 850	18
Sinclair v. *United States*, 279 U.S. 263	20
Stillman v. *United States*, 177 F. 2d 607	20
United States v. *Alu*, 236 F. 2d 29	11, 12
United States v. *Brandt*, 139 F. Supp. 362	17
United States v. *Hiss*, 185 F. 2d 822, certiorari denied, 340 U.S. 948	13
United States v. *Moran*, 236 F. 2d 361, certiorari denied, 352 U.S. 909	18
United States v. *Nessanbaum*, 205 F. 2d 93	11

Cases—Continued Page

United States v. *Parker*, 244 F.2d 943 9
United States v. *Remington*, 191 F. 2d 246, certiorari denied, 343 U.S. 907 ..... 8, 9, 10, 12
United States v. *Rose*, 215 F. 2d 617 ..... 9, 11, 12
United States v. *Wood*, 14 Pet. 430 ..... 9, 10
Weiler v. *United States*, 323 U.S. 606 9
Weinbaum v. *United States*, 184 F. 2d 330 13
Young v. *United States*, 212 F. 2d 236, certiorari denied, 347 U.S. 1015 9

Statutes and rule:

18 U.S.C. 1621 ..... 2, 4
28 U.S.C. 1732 20
28 U.S.C. 1733 20
28 U.S.C. 1861 ..... 3, 15
28 U.S.C. 1864 ..... 3, 16, 17
28 U.S.C. 1865 ..... 4, 18
Rule 12, Federal Rules of Criminal Procedure 15

In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 411

GEORGE SAM MAGIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. 43-53) is reported at 280 F. 2d 74.

JURISDICTION

The judgment of the Court of Appeals was entered on June 10, 1960 (Pet. 58). A petition for a rehearing was denied on July 25, 1960. On August 18, 1960 Mr. Justice Clark extended the time for filing a petition for a writ of certiorari to and including September 13, 1960. The petition was filed

on September 12, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the element of intent in perjury cases must be proved by direct evidence.

2. Whether the trial court improperly denied petitioner's motion to subpoena grand jurors and government attorneys.

3. Whether petitioner was prejudiced by the fact that former associates of his, called as witnesses by the government, claimed their privilege against self-incrimination, when the trial court instructed that the jury was not to consider such claims as evidence against the defendant.

4. Whether the grand and petit juries were drawn in compliance with 28 U.S.C. 1864 and 1865.

5. Whether there were errors at the trial.

STATUTES INVOLVED

18 U.S.C. 1621 provides:

> Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall, except as otherwise expressly provided by law, be fined

not more than $2,000 or imprisoned not more than five years, or both.

28 U.S.C. 1861 provides:

Qualifications of Federal jurors

Any citizen of the United States who has attained the age of twenty-one years and who has resided for a period of one year within the judicial district, is competent to serve as a grand or petit juror unless—

(1) He has been convicted in a State or Federal court of record of a crime punishable by imprisonment for more than one year and his civil rights have not been restored by pardon or amnesty.

(2) He is unable to read, write, speak, and understand the English language.

(3) He is incapable, by reason of mental or physical infirmities to render efficient jury service.

28 U.S.C. 1864 provides in relevant part:

Manner of drawing; jury commissioners and their compensation

The names of grand and petit jurors shall be publicly drawn from a box containing the names of not less than three hundred qualified persons at the time of each drawing.

The jury box shall from time to time be refilled by the clerk of court, or his deputy, and a jury commissioner, appointed by the court.

* * * *

The jury commissioner and the clerk, or his deputy, shall alternately place one name in the jury box without reference to party affiliations, until the box shall contain at least 300 names or such larger number as the court determines.

This section shall not apply to the District of Columbia.

28 U.S.C. 1865 provides in relevant part:

> *Apportionment within district; additional jury commissioners*
>
> (a) Grand and petit jurors shall from time to time be selected from such parts of the district as the court directs so as to be most favorable to an impartial trial; and not to incur unnecessary expense or unduly burden the citizens of any part of the district with jury service. To this end the court may direct the maintenance of separate jury boxes for some or all of the places for holding court in the district and may appoint a jury commissioner for each such place.
>
> * * * * *

STATEMENT

A four-count indictment returned December 12, 1956, in the United States District Court for the Eastern District of Illinois, charged petitioner with perjury, in violation of 18 U.S.C. 1621, growing out of his testimony before a federal grand jury. After some six pretrial hearings granted by the court in its consideration of petitioner's nine pre-trial motions (including a motion to subpoena grand jurors and a motion attacking the validity of the grand jury returning the indictment) (App. 1-4, 15-17, 29-30),[1] petitioner went to trial on September 28, 1959 on three counts of the indictment[2] (App. 5, 35, 39). He

---

[1] Unless otherwise indicated, "App." refers to the appellant's appendix in the court below.

[2] The fourth count of the indictment was dismissed on October 22, 1958 upon motion of the government (App. 2).

was found guilty on counts 1 and 2 (App. 143) and was sentenced to three years' imprisonment and fined $2000.00 (App. 168-169). The Court of Appeals affirmed.

A. The Evidence as to Counts 1 and 2

Count 1 of the indictment charged that petitioner, while under oath before a grand jury, wilfully testified falsely, on August 10, 1956, that he had never had business connections, as partner or associate, with Elmer "Dutch" Dowling (App. 7-8). Count 2 charged that petitioner falsely testified on the same date he had never had business connections with Frank Wortman (App. 9-10).

The foreman of the grand jury and two Assistant United States Attorneys assigned to the jury testified that petitioner appeared there as a witness in an investigation of alleged income and wagering tax violations by petitioner, Dowling, Wortman and others (App. 49-67). Both Assistant United States Attorneys testified (App. 59, 65), and a court reporter introduced a partial transcript of the hearing to show (App. 80-82), that petitioner at that time denied having, or ever having had, any business associations with Dowling and Wortman. The transcript also showed that petitioner testified that he had known Wortman, a friend and neighbor, for nine years and that he had known Dowling for three or four years (App. 81).

The government introduced, through an internal revenue district tax collector, a number of federal income tax returns for the years 1951-1955 (App. 90-93). These included personal returns of peti-

tioner and his wife, bearing their signatures, and further identified by the accountant who prepared them (App. 110), which reflected petitioner's receipts of dividends from six partnerships (described at trial as gambling ventures). The government also introduced income tax returns of the partnerships so listed by petitioner. These returns, which were not signed by petitioner, showed the partners in the ventures to be petitioner, Wortman, Dowling and others. Most of the partnership returns were prepared by the same accountant who prepared petitioner's returns (App. 110). Both the partnership and personal returns revealed that petitioner's earnings ran as high as $19,000 in one year from one venture (App. 91, 93).

The government also introduced business records of the partnerships, through the accountants who kept them (App. 101, 112-119). These records likewise showed that petitioner held mutual interests in these ventures with Wortman, Dowling and others. The number of participants in each venture was eight or nine persons (with the exception of one venture in which there were thirteen persons). Petitioner's interest was generally 5%, although in one instance it was 10%; the respective interests of Wortman and Dowling ranged from 13% to 32½%.

B. The Court's Instructions

The court, after giving a lengthy charge as to reasonable doubt and the elements of the offense (App. 129-134), instructed that a conviction of perjury must be based upon the testimony of two witnesses or that of one witness corroborated by other

substantial evidence (App. 135). It explained that the evidence in the crime of perjury must be direct and positive as distinguished from circumstantial (App. 135). It continued (App. 135-136):

> Even if you believe, Ladies and Gentlemen, beyond a reasonable doubt that the defendant and Frank Wortman and Elmer Dowling were partners or owned shares in the same syndicate or syndicates at the times mentioned in the evidence, and that the defendant under oath denied that this was so, this would still be insufficient in itself to warrant conviction under Counts I and II of the indictment. You would be required further to find and believe beyond a reasonable doubt that at the time of his denial under oath the defendant knew and believed such fact.
>
> * * * *
>
> This is because the laws of the United States do not condemn and punish as perjury the making of a statement, even under oath, simply because it is contrary to objective fact. They require, in addition, knowledge on the part of the defendant and a belief by him contrary to his statement, and the burden is upon the government to prove that knowledge and belief beyond a reasonable doubt.
>
> The question of intent is a matter for you, as jurors, to determine, and, as intent is a state of mind and it is not possible to look into a man's mind to see what went on, the only way you have of arriving at the intent of the defendant in this case is for you to take into consideration all of the facts and circumstances shown by the evidence, including the exhibits, and determine from all such facts and circumstances what the intent

of the defendant was at the time in question. Thus, direct proof of willful or wrongful intent or knowledge is not necessary. Intent and knowledge may be inferred from acts and such inferences may arise from a combination of acts, although each act standing by itself may seem unimportant. These are questions of fact to be determined from all the circumstances.

ARGUMENT

1. Petitioner, relying primarily on an alleged conflict with *United States* v. *Remington*, 191 F. 2d 246 (C.A. 2), certiorari denied, 343 U.S. 907, contends (Pet. 17-21) that the "two witness" rule of proof in perjury cases applies not only to the falsity of the statement, but also to the defendant's knowledge or belief that it was false. This is not, and has never been, the law, and the court below correctly held that the jury was properly permitted to infer that petitioner believed that his testimony was false, without any direct proof of such belief. The court below, however, misinterpreted the *Remington* case as holding to the contrary.

Subjective elements of a crime pertaining to the state of a man's mind, such as intent, knowledge, belief, and recollection, must of necessity be proved by circumstantial evidence. Even in the case of treason, where the requirement that the overt act be proved by two witnesses is imposed by the Constitution, the mental state of disloyalty, of adherence to the enemy, may be established by circumstantial evidence. *Cramer* v. *United States*, 325 U.S. 1, 30-35; *Haupt* v. *United States*, 330 U.S. 631, 644-646. A

fortiori, in the case of the less serious offense of perjury, where the "two witness" rule was judicially created (see *Weiler* v. *United States*, 323 U.S. 606, 608-610), the defendant's subjective state of mind may be established circumstantially. Indeed, to require direct evidence that the defendant believed that his statement was false would make it virtually impossible ever to obtain a conviction for perjury. Thus the courts of appeals have not required that the intent element of perjury be shown by direct evidence, but have permitted it to be proved circumstantially. *E. g.*, *Young* v. *United States*, 212 F. 2d 236 (C.A. D.C.) certiorari denied, 347 U.S. 1015; *United States* v. *Rose*, 215 F. 2d 617 (C.A. 3); *United States* v. *Parker*, 244 F. 2d 943, 950 (C.A. 7); see *United States* v. *Wood*, 14 Pet. 430, 439.

The Court of Appeals misinterpreted *United States* v. *Remington*, *supra*, as holding that the "two witness" rule also applies to proving that the defendant believed that his statement was false. Although the court in *Remington* stated that the crime of perjury consists in the contradiction between the accused's oath and his belief (191 F. 2d at 249), it further pointed (*ibid.*) out that the only "direct" evidence that the defendant did not believe the truth of what he swore would be "his own [written] declarations of his belief." Since, however, perjury prosecutions are not limited to this kind of proof, the court concluded (*ibid.*):

> Hence it must be that the rule peculiar to perjury as to the character of the proof, means that it is the facts from which the jury may

> *infer* the accused's state of mind that must be proved by "direct" evidence. And this view is confirmed by Chief Justice Vinson's opinion in *American Communications Ass'n* v. *Douds*, 339 U.S. 382, 411, * * * where it is said: "* * * while objective facts may be proved directly, the state of a man's mind must be *inferred* from the things he says or does. * * *" [Emphasis added.]

In other words, *Remington* held only that the government must show by direct evidence that the defendant did or said certain things, from which the jury may infer that he intended to swear falsely. It did not hold, however, that the defendant's belief that his testimony was false need be established by direct evidence.

In the instant case, the government introduced substantial direct evidence from which the jury properly inferred that petitioner intended to testify falsely. The evidence was documentary, emanated from the accused and had the characteristics of written declarations. See *United States* v. *Wood*, 14 Pet. 430, 439. The personal income tax returns of petitioner showed that he collected substantial income over a period of five consecutive years from the various gambling ventures in which Wortman and Dowling had interests. Moreover, and independently, petitioner's testimony before the grand jury established that he had known Dowling for three or four years and that Wortman had been his friend and neighbor for nine years. These are the direct facts from which the jury was fully warranted in inferring knowledge of falsity. As the court below noted (Pet. 51), it would "strain a juror's credulity

to the breaking point to believe that one who had been associated with a relatively small group in a number of unlawful endeavors for a period of five years, did not know those associated with him," some of whom were his friends or neighbors.[3]

2. There is no merit to petitioner's argument (Pet. 22-23) that the trial court erred in denying his pretrial motion to subpoena the grand jurors and the government attorneys who heard his perjured testimony. The argument is that such witnesses could have testified to facts bearing on the materiality of the false testimony and on whether petitioner made the statements charged. But petitioner had been furnished a transcript of his entire grand jury testimony before he made the motion (App. 2, 71) and he has never denied making the statements. Although the burden of proof was of course on the government to show materiality, this required only a showing that the false statements had the natural effect or tendency to impede the investigation. *United*

---

[3] The other cases that petitioner cites as in conflict with the decision below (Pet. 17) are clearly distinguishable. In some of those cases, perjury convictions were reversed because the evidence did not justify the inference of intent to swear falsely; they were not reversed because the evidence of intent was circumstantial rather than direct. See, *e.g.*, *Fotie* v. *United States*, 137 F. 2d 831 (C.A. 8); *Beckanstin* v. *United States*, 232 F. 2d 1 (C.A. 5); *United States* v. *Nessanbaum*, 205 F. 2d 93 (C.A. 3); *United States* v. *Rose*, 215 F. 2d 617 (C.A. 3). In *Fotie*, *supra*, the court observed: "Necessarily the recollection of a witness must be shown by circumstantial evidence" (137 F. 2d at 842). *United States* v. *Alu*, 246 F. 2d 29 (C.A. 3), turns not upon proof of intent, but upon proof of the underlying facts necessary to establish that the testimony was false.

States v. *Alu*, 246 F. 2d 29 (C.A. 2); *Dolan* v. *United States*, 218 F. 2d 454 (C.A. 8), certiorari denied, 349 U.S. 923. The government met that burden here. Two Assistant United States Attorneys and the foreman of the grand jury testified and were cross-examined by petitioner, as to the subject matter of the grand jury's investigation. Petitioner's suggestion that other jurors might have testified differently as to the purpose of the investigation is pure speculation. After the government's case was in, petitioner did not renew his request. He did not then and does not now point to anything elicited on cross-examination nor to any other evidence which would show a basis for a reasonable belief that there would be contrary evidence from other jurors. In those circumstances, petitioner has not made a sufficient showing to warrant a departure from the traditional policy of secrecy surrounding grand jury proceedings. See *Pittsburgh Plate Glass Company* v. *United States*, 360 U.S. 395, 400; *United States* v. *Rose*, 215 F. 2d 617, 628 (C.A. 3); *United States* v. *Remington*, 191 F. 2d 246, 251 (C.A. 2), certiorari denied, 343 U.S. 907.

3. At the beginning of trial, after the selection of a jury, petitioner moved for a hearing to determine, out of the presence of the jury, whether Wortman, Dowling, and two other witnesses, all under subpoena by the government, would claim the privilege against self-incrimination (App. 35-36). At the argument on the motion, government counsel stated that Wortman and Dowling were material witnesses and that he had never examined them (App. 37). He noted

that the other two witnesses had not claimed the privilege before the grand jury or at any other time, and indicated that his examination of them would be no greater in scope than it was before the grand jury (App. 37). The court, after recessing to study the question, denied the motion (App. 39).

At trial the four witnesses did claim the privilege. The court instructed the jury (App. 137) that this fact could not be considered in any way as evidence, or in any way as militating against the defendant or as relieving the government of its burden of proving every element of the offense beyond a reasonable doubt. It charged (*ibid.*) that the privilege against compulsory self-incrimination was the right of every person guaranteed by the Constitution and that its exercise by one person could not be employed by the prosecution to create an inference that another person may be guilty of crime.

In view of the fact that two witnesses had talked freely before the grand jury and that the other two had never been examined, petitioner's suggestion that government counsel acted in bad faith (*i.e.* that government counsel knew the witnesses would claim the privilege (Pet. 24-28)) has no factual basis. The government, therefore, had no reason to refrain from calling the witnesses. And in view of the trial court's instructions, and the strong evidence of guilt, petitioner could not have been prejudiced by the claims. See *Weinbaum* v. *United States*, 184 F. 2d 330, 331 (C.A. 9); *United States* v. *Hiss*, 185 F. 2d 822, 831-832 (C.A. 2), certiorari denied, 340 U.S. 948.

4. Prior to trial petitioner filed a motion to dismiss the indictment (App. 15-17), in which he alleged that the grand jury which returned the indictment (as well as the grand jury before which he allegedly testified falsely under oath)[4] was not a legally constituted body. He alleged that, contrary to the requirements of 28 U.S.C. 1864 (*supra*, p. 3), the names of the grand jurors had not been publicly drawn from a jury box containing the names of at least 300 qualified persons, which had been placed there alternately by the Jury Commissioner and the Clerk of Court. The court, after a full hearing at which it heard testimony from the Clerk of Court and the Jury Commissioner, concluded in a comprehensive opinion (see Appendix for Appellee, pp. 38-47) that not only was the motion untimely filed under Rule 12 of the Federal Rules of Criminal Procedure and its local Rule 27, but that the evidence conclusively showed that the grand jury had been drawn in strict compliance with 28 U.S.C. 1864.[5] The Court

---

[4] The indictment was returned by a grand jury sitting in December 1956 which had been drawn in accordance with the order of the court on July 23, 1956. The grand jury which heard the perjured testimony sat on August 10, 1956.

[5] The transcript of the hearing appears at pp. 1-37 of the Appendix for the Appellee. This testimony is reviewed in detail in the court's opinion (see *id.*, pp. 43-46). In substance it is as follows:

The Clerk of the Court testified that the Jury Commission, composed of himself and the Commissioner, used questionnaires as well as information secured from acquaintances in contacting prospective jurors; that only the names of those qualified persons were written on the cards placed in the jury box alternately by him and the Commissioner; that he

of Appeals without discussion found the issue to be lacking in merit (Pet. 53).

(a) Petitioner here renews his contention that the jurors were unqualified or improperly selected. It has no substance.[8]

Qualifications of jurors are set forth in 28 U.S.C. 1861 (p. 3, *supra*). It provides that any United

---

checked the box two or three times a year to insure that sufficient names were in the box and that there had at all times been more than 300.

The Clerk further testified that the grand jury which had returned this indictment had been drawn by him and the Commissioner from the entire district and that this time, as all other times, the drawing was public.

The Jury Commissioner testified that since the filing of petitioner's motion he had counted the cards in the jury box and found many more than 300; that his earlier statement in an affidavit filed by petitioner implying the contrary was inaccurate; that the affidavit had been drawn up and presented to him for his signature by defense counsel at a time when he was busy and he had not read it carefully.

Both officials testified that, where court orders directed the selection of jurors from restricted areas of the district, they, in publicly drawing names from the box, lay aside those names of persons whom they knew not to reside in the restricted area.

[8] While discussing the question on the merits, we also rely on the ruling of the district court that the petitioner waived his right of challenge by late presentation with no showing of cause for delay. Rule 12, Federal Rules of Criminal Procedure.

Petitioner was indicted on December 6, 1956. At the time of his arraignment on December 11, 1956, the court granted leave to file motions on or before December 31, 1956. While numerous motions were filed by petitioner during 1957 and 1958, it was not until May 8, 1959, twenty-nine months after arraignment, that the motion attacking the validity of the grand jury was filed (App. 1-2).

States citizen at least 21 years old with a residence of one year within the judicial district is competent to serve, unless he has been convicted of a felony or is physically or mentally incapacitated (p. 3, *supra*). The statute prescribes no special method for determining such qualifications; it does not specify who among jury officials shall make the determination. It provides merely that the names of such qualified persons shall be placed in a box alternately by the Clerk and the Commissioner without reference to party affiliation until the box contains 300 names or more, with replenishment from time to time. 28 U.S.C. 1864 (p. 3, *supra*). Beyond this, and the requirement that the drawing of names of jurors from the box be public, the method of selection is left to the discretion of the Clerk and the Commissioner, limited only by the requirement that the method be one designed to make the jury "a cross-section of the community" and "truly representative of it," a matter not raised here. See *Glasser* v. *United States*, 315 U.S. 60, 86; *Ballard* v. *United States*, 329 U.S. 187, 191; *Dow* v. *Carnegie-Illinois Steel Corp.*, 224 F. 2d 414 (C.A. 3), certiorari denied, 350 U.S. 971.

In the light of these provisions, it is apparent that even were petitioner's so-called "uncontradicted facts" (Pet. 33-35), some of which are not borne out by the record, accepted as true, they would not show the invalidity of the jury. Thus the use or non-use of questionnaires to select qualified jurors is *per se* irrelevant. See *Dow* v. *Carnegie-Illinois Steel Corp.*, *supra*, 224 F. 2d at 428. It does not matter that the

Commissioner did not examine the returned questionnaires. The important fact is, and this is borne out by the evidence, that only the names of qualified persons were placed in the box. The Clerk testified that jury cards were made only for those persons found to be physically competent or non-exempt by information secured through answers to questionnaires or, upon a few occasions, information secured from acquaintances familiar with the required qualifications (App. for Appellee 3, 4). In this regard, the testimony of the Clerk was that forms specifically requesting information as to conviction for criminal offenses were examined before jury cards were placed in the box (App. for Appellee 19, 20, 24).

It is likewise immaterial that no independent record of the names in the jury box was kept or that the names were not re-examined by the Commissioner. The statute does not contemplate that jury officials maintain constant surveillance over the physical, mental and residential status of persons whose names are in the box. *United States* v. *Brandt*, 139 F. Supp. 362 (N.D. Ohio). It requires only that the number of names be kept at no less than 300. The testimony of the Clerk was unequivocal that he counted the cards two or three times a year and that there were always more than 300 names in the box (App. for Appellee 6, 7, 21).

As to the drawing of names from the jury box, the record is clear that this was done publicly in compliance with the statute (App. 20-21; 28 U.S.C. 1864, p. 3, *supra*). What petitioner refers to as a "sorting process" is merely the practice by which

the Clerk and the Commissioner, in special instances where the court ordered selection from specified areas of the district (28 U.S.C. 1865, p. 4, *supra*), would, in drawing, lay aside cards bearing names of those persons not within the specified area. The maintenance of separate jury boxes is not required in such instances. The language of Section 1865 is permissive and discretionary that the court under such circumstances "*may direct* the maintenance of separate jury boxes *for some or all of the places for holding court*" (emphasis added). Moreover it should be noted that the evidence shows that here the grand jury was drawn not from a particular area but from the entire district (Apps for Appellee 19).

(b) Petitioner further attacks the validity of the petit jury, as he did prior to trial by motion to quash panel or venire (App. 31-33), on the ground that the court's order directing selection from a designated part of the district so as to conserve transportation expenses was not consistent with the requirement of an impartial trial. See 28 U.S.C. 1865, p. 4, *supra*. But the court had upon two previous occasions found no merit in general assertions that, because of adverse publicity regarding petitioner's character and associations, petitioner could not have a fair trial within the district (App. 15, 29). There is no showing that this was an abuse of discretion. See *Kersten* v. *United States*, 161 F. 2d 337, 339 (C.A. 10); certiorari denied, 331 U.S. 851; *Shockley* v. *United States*, 166 F. 2d 704, 709-710 (C.A. 9), certiorari denied, 334 U.S. 850; *United States* v. *Moran*, 236 F. 2d 361, 362 (C.A. 2), certiorari denied, 352 U.S. 909.

5. The various other claims of error are without merit.

(a) The record refutes the allegation that defense counsel, who claimed he might be a defense witness, was not permitted to withdraw as attorney of record. Attached to the government's answer to the petition for rehearing in the court below is the record at the hearing on June 23, 1959, when the case was set for trial in September. On June 19, the court had denied the motion of counsel to withdraw. A further motion to withdraw was made on June 23 together with a motion for continuance to enable defendant to get another attorney. The court pointed out that if counsel withdrew he would not be permitted to sit at counsel table, and asked petitioner if he understood that and would retain other counsel. When petitioner replied affirmatively the court continued the case until September. The court specifically said (Appellee's Answer to Pet. for Rehearing, p. 10) "You understand, Mr. Foreman, you are not to participate as attorney and not to participate in the trial of this case." Counsel replied that he so understood. There was then discussion as to the prior denial of the motion to withdraw on June 19, when petitioner had not been present. The court set aside the order of June 19 and granted the United States Attorney's motion that counsel's motion of June 19 be stricken in "view of Mr. Foreman's withdrawal" (*id.*, p. 11). Mr. Foreman did not try the case and was excluded as a witness.

(b) The court's charge was fair. The quantum of proof rule of perjury cases was adequately stated

(see Pet. 20); App. 135; *supra*, pp. 7-8). The instruction that the allegedly perjurious statements, if made, were material to the matter being investigated was proper. Materiality is a question of law for the court. *Sinclair* v. *United States*, 279 U.S. 263.

(c) The income tax returns and the business records made in the regular course of business were properly admitted into evidence. 28 U.S.C. 1732, 1733. *Arena* v. *United States*, 226 F. 2d 227 (C.A. 9); *Stillman* v. *United States*, 177 F. 2d 607 (C.A. 9).

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.

MALCOLM RICHARD WILKEY,
Assistant Attorney General.

BEATRICE ROSENBERG,
JULIA P. COOPER,
Attorneys.

NOVEMBER 1960.

☆ U. S. GOVERNMENT PRINTING OFFICE 1960 873972 547